Supreme Court, U.S.
FILED

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No. 06 -

In The

SUPREME COURT OF THE UNITED STATES

Trevor Cazoe, (Agency No. 72-771-030)
Petitioner,

vs.

Alberto Gonzales, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Trevor Cazoe

QUESTION PRESENTED

The Petitioner is Trevor Cazoe a native and citizen of Trinidad and an individual who challenged the Respondent's finding, in removal proceedings, that he was subject to removal from the United States as an aggravated felon and thereby ineligible for any for of relief in removal proceedings. In a decision entered on April 19, 2005, the Board of Immigration Appeals denied the Petitioner's administrative appeal. On the date of the Board's order, the court of appeals had no jurisdiction to consider the Petitioner's challenge to the Board's removal order.

The Petitioner filed a petition for habeas corpus with the US District Court for the Eastern District Of Pennsylvania. On or about June 9, 2005, the District Court transferred the appeal to the US Court of Appeals for the Third Circuit. Prior to the transfer of the appeal, the Respondent raised no challenge to the Petitioner's appeal on the basis that the appeal was untimely. The Respondent filed a motion seeking dismissal of the Petitioner's appeal as untimely after Petitioner's brief had been filed with the Court of Appeals.

On or about November 17, 2006, the Court of Appeals sustained the Respondent's motion to dismiss, asserting that it lacked jurisdiction to consider the Petitioner's appeal as it believed the appeal to have been untimely filed with the US District Court. Petitioner's petition for rehearing was denied on or about January 17, 2007.

The question presented is:

Whether the Court of Appeals has interpreted the Real

ID Act in a manner consistent with the requirements of due process and equal protection when it asserts lack of jurisdiction to consider Petitioner's appeal due to Petitioner's failure to file an appeal by May 19, 2005, 30 days after issuance of the Board's order where, prior to May 11, 2005, the court of appeals had no statutory authority to consider the Petitioner's due to the Respondent's designation of the Petitioner as an aggravated felon, where Congress expressed no clear intention of giving aliens such as the Petitioner only 8 days in which to file a petition for review while granting other aliens 30 days to file such appeals and no rational basis for treating similar aliens differently exists, where the Real ID Act states that the Court of Appeals must accept jurisdiction over appeals transferred from the District Court under the Act and prohibits dismissal of such appeals on jurisdictional grounds for failure to file within the normal 30 day deadline, and where INA section 242(b)(1)'s assertion of a 30 day filing deadline for a petition for review from the date on which the order of removal is entered, presumes that the court of appeals has jurisdiction over the petition for review from the date the removal order is entered, and when the Real ID Act made no provision for addressing the jurisdictional gap that exists between the date on which an order of removal is entered by the Respondent and the date on which a Circuit Court acquires jurisdiction to adjudicate an appeal?

PARTIES TO THE PROCEEDINGS

Petitioner is Trevor Cazoe.. Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Trevor Cazoe, respectfully petitions for a writ of certiorari to review the decision below judgment of the United States Court Of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals below is unreported.

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Rehearing was entered on January 17, 2007. Judgment of the Circuit Court on the original appeal was entered on November 17, 2006. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Real ID Act, are found at Pub.L. No. 109-13, Div. B, 119 Stat. 231 (2005). Not reprinted, but wholly applicable are the
equal protection and due process clauses of the United States Constitution.

STATEMENT OF THE CASE

1. Statutory Background-

The instant proceeding involves an important question of exceptional importance as there is a conflict among the Circuit Courts regarding the proper interpretation of the Real ID Act regarding the statutory requirement that Petitions or Review be filed within 30 days of the date a final order of removal is entered where there is a gap in time between the date on which the administrative order is entered and the date on which the Circuit Courts acquires jurisdiction to consider such appeals under the Real ID Act. In this case, the Court of Appeals asserted that it lacked jurisdiction to consider the Petitioner's appeal because it was not filed with the District Court within 30 days of the entry of the order of removal. The court did not accept the Petitioner's evidence that he asserted established that the appeal was filed by May 19, 2005. The District Court's docketing information indicated that the appeal was accepted on May 23, 2005. The Petitioner argued that irrespective as to whether the filing date was May 19th or the 23rd, the appeal was timely filed with the District Court and properly transferred to the Court of Appeals on June 9, 2005, one day prior to June 10, 2005, the thirtieth day after which the Court of Appeals acquired jurisdiction to consider the appeal pursuant to the Real ID Act.

More over, the Petitioner asserts that the Court Of Appeals erred as it ignored the plain intent of Congress as expressed in the Act in that Congress

made clear that once an appeal is transferred by the District Court to the Circuit Court under the provisions of the Act, the appeal could not be dismissed for lack of jurisdiction based on the failure to file the appeal within the normal the 30 day deadline.

As will be discussed more fully below, the Act contains numerous drafting flaws, as have been noted by courts around the country. The error specifically applicable in this appeal is the Act's failure to provide a remedy where there is gap in time between the effective date of the Act and the date on which the order of removal is entered.

Though Petitioner argued strenuously before the Court of Appeals that Congress waived the 30 day filing deadline for any petition actually transferred to a Court of Appeal precisely to avoid this legal dilemma, the Circuit Court rejected the argument and asserted that the 30 day deadline applied, even though 22 days of the 30 day deadline had already expired prior to the date on which the Circuit Court actually had any jurisdiction to consider the appeal.

The Court of Appeal's interpretation of the Real ID Act renders portions of the Act unconstitutional as the interpretation permits violations of alien's rights to Equal Protection under the law and Due Process of Law. It is plain that Congress' reference to the date on which the Board rendered its final administrative decision as the start of period on which to calculate the filing deadline was based on the presumption that the Courts of Appeal had jurisdiction to review Board determinations as of that date. Congress did not, however, make any specific provision for the narrow

class of aliens, such as the Petitioner, over whose petitions the Courts of Appeals had no appellate jurisdiction as of the date of the Board's final order other than providing that once an action was transferred to the Courts of Appeal, the Circuit Courts could not dismiss the appeals for want of jurisdiction.

The interpretation of the jurisdictional provisions of the Act, as rendered by the Court of Appeals, purported to require Petitioner to file a petition for review within 8 days of the date on which the court acquired jurisdiction to consider the appeal rather than the 30 day statutory deadline provided for in the Act. The Court of Appeals provided no rational justification as to why Congress intended would permit an 8 day filing deadline for Petitioner and similarly situated aliens and 30 days for other aliens.

In this action, the Petitioner asserts that no finding of lack of jurisdiction over his appeal can be based on periods of time during which the Court of Appeals had no actual or legal jurisdiction to consider the appeal. Stated differently, inasmuch as the Court of Appeals' jurisdiction over alien appeals such as the Petitioner's did not vest until May 11, 2005, the appeal could not be dismissed for lack of jurisdiction prior to June 10, 2005. Petitioner's appeal was presented to the District Court prior to June 10, 2005 and was ultimately transferred to the Court of Appeals pursuant to the Real ID Act and thus, was timely filed. The Court of Appeals had jurisdiction over the appeal as of the date it was transferred and the Court of Appeals erred in rejecting the appeal upon the basis of want of jurisdiction. Accordingly, the Court of Appeals was presented with due process issues in

the Petitioner's petition for review and its summary affirmance of the Board's decision without consideration of the constitutional issues, which it was permitted to consider pursuant to the Real ID Act, was plain error.

2. Proceedings Below

The Petitioner is Trevor Cazoe, a native and citizen of Trinidad and Tobago, born on June 25, 1956. The Petitioner entered the United States on or about August 3, 1989 through San Juan, Puerto Rico as a visitor. Subsequent to his entry into the United States, the Petitioner married June Wallace, a US citizen. Eventually adjusted his status to that of a lawful permanent resident on or about February 21, 1996 based on his marriage to Mrs. Cazoe. The Petitioner and his wife and children resided in New Castle, Delaware prior to his having been placed into removal proceedings. Since the filing of the original habeas action, the Petitioner has been removed to Trinidad and Tobago. This court granted a stay of removal in the case subsequent to his return to Trinidad and Tobago.

On or about November 23, 2004, the Respondent filed form I-862, the Notice to Appear, alleging that the Petitioner was, on or about August 24, 2004, convicted of 2 counts of unlawful sexual contact in the third degree, pursuant to Title 11, Chapter 5, subsection 767.1, and rape in the fourth degree, pursuant to Title 11, Chapter 5, Subsection 770, of the Delaware Code. The Respondent asserted that the convictions were entered by the Delaware Superior Court For New Castle County. (AR 66-68) The Respondent asserted in

the NTA that a victim of the Petitioner's criminal conduct was a minor under the age of 18.

The agency sought the Petitioner's removal as it charged that his criminal convictions constituted removable offenses and aggravated felonies as defined both at INA section 101(a)(43)(A) and (F). The agency did not, however, specify which of the two Delaware offenses served as the foundation for which charge of removability. Moreover, the Respondent failed to specify whether it believed the Petitioner was removable under INA section 101(a)(43)(A) because it believed him to have committed a rape related aggravated felony or an aggravated felony related to the sexual abuse of a minor. INA section 101(a)(43)(A) is divisible to the extent that it permits an alien's removability for three types of offenses: (1) murder; (2) rape; and (3) the sexual abuse of a minor.

The Petitioner was represented by former counsel, and conceded the Petitioner's removability. Former counsel also informed the immigration judge that he wished to present arguments and brief the legal issues related to the question of whether the Petitioner's offense (s) constituted an aggravated felony or felonies as had been charged in the NTA. The immigration judge refused the request for briefing and entered an order of removal against the Petitioner at his first master calendar hearing.

The Petitioner filed an administrative appeal with the Board of Immigration Appeals. Subsequent to the filing of the appeal, the immigration judge entered an order denying the Petitioner's motion to reconsider.

On April 19, 2005, the Board adjudicated the Petitioner's appeal, and determined that the Petitioner's rape related offense constituted an aggravated felony as it believed the offense to be a crime of violence.

The Petitioner filed a petition for habeas corpus with the US District Court for the Eastern District Of Pennsylvania contending that the Board erred in concluding that his Delaware rape conviction was an aggravated felony related to a crime of violence. Prior to the final adjudication of the habeas action on the merits by the District Court, Congress passed the Real ID Act and the District Judge determined that the matter should be transferred to the US Court of Appeals for the Third Circuit pursuant to that Act.

On or about November 17, 2006, the Court of Appeals granted the Respondent's motion to dismiss the Petitioner's appeal asserting want of jurisdiction. Petitioner filed a timely Petition for rehearing. On or about January 17, 2007 the Court of Appeals denied the request for rehearing.

Reasons For Granting the Petition

The Court of Appeals erred in asserting a jurisdictional defect in the Petitioner's challenge to the Respondent's removal order and its interpretation of the jurisdictional provisions of the Real ID Act was constitutionally impermissible as it violated both the equal protection and due process clauses of the United States constitution.

In the original proceeding, the Respondent asserted that this court lacked jurisdiction to consider the

merits of the Petitioner's appeal. Specifically, the Respondent asserted that the Petitioner's habeas action was untimely filed because the decision of the Board of Immigration Appeals was issued on or about April 19, 2005 and the docketing materials from the District Court indicate that the appeal was filed on May 23, 2005.

The plain language of the Real ID Act contradicted the Respondent's jurisdictional challenge. In pertinent part, the Real ID Act states: " ...The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section..., **except that subsection (b)(1)[30 day time limit] of such section shall not apply.** (emphasis added). (See Real ID Act of 2005 Pub. L. No. 109-13, 119 Stat 231(May 11, 2005) The Petitioner asserted that once his habeas action was transferred to the Court of Appeals pursuant to the Real ID Act, the Court of Appeals, by the plain language of the statute, was required to adjudicate the merits of the appeal and could not reject it on the basis that it lacked jurisdiction over the appeal because the Petitioner failed to comply with the 30 day time limit.

The statute states explicitly that the Circuit court **shall** treat the transferred case as if it had been filed as a petition for review and states that the 30 day time limit **shall** not apply. Petitioner asserted that any jurisdictional challenge due to the alleged untimely filing before the District Court had to be raised before
the **District Court** , which the Respondent failed to do, because once the transfer to the court of appeals was effectuated, the jurisdiction of this court became perfected.

The Court of Appeal granted the Respondent's motion to dismiss, citing language in the Real ID Act requiring that a petition for review be filed with the appropriate Court of Appeal within 30 days from the date of the final administrative order issued by the Board. It is clear, however, from the record and the evidence regarding the enactment of the Real ID Act that this court did not have any jurisdiction to consider a petition for review filed by the Petitioner prior to May 11, 2005 as its jurisdiction was conferred as of that date. By May 11, 2005, approximately 22 days of the Petitioner's purported 30 day filing deadline had already elapsed. Though the original panel asserted that the 30 day deadline was applicable and that the specific language of the statute that the 30 day deadline did not apply to transferred cases was irrelevant to the Petitioner's appeal since he had no action :"pending" as of May 11, 2005, the Court of Appeals offered no explanation as to how the Petitioner could legally be obligated to file a petition for review during the 22 days in which the Court of Appeals had no jurisdiction to consider such an appeal or why it believed the Act rightly intended to penalize the Petitioner for having failed to so file the appeal within that 22 day period.

Similarly, according to the Court of Appeals' interpretation, Congress intended that the Petitioner be granted a mere 8 days in which to submit his petition for review, notwithstanding the fact that other similarly situated aliens are granted 30 days in which to file such appeals. The Court of Appeals offered no rational explanation as to why Congress would establish wholly different deadlines for similarly situated individuals.

The fact of the matter is that the Real ID Act contains many drafting flaws as have been noted by federal courts around the country. The Court of Appeals for the 3rd Circuit, in *Bonhometre v. Gonzales*, 414 F.3d 442 (3rd Cir. 2005), noted that the Act made no provision for the treatment appeals pending in this court on habeas petitions adjudicated by the District Court prior to the Real ID Act as such appeals were not "pending" before the District Courts on May 11, 2005. The First, Second, Fifth, Sixth, Eight, and Ninth circuits have all noted similar drafting defects in the Act. The Ninth Circuit, in *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (2005) called the drafting error an "oversight". Similarly, the Ninth Circuit described the drafting flaws "ambiguous" in *Martin-Rosas v. Gonzales*, 424 F. 3d 926 (2005).

Other errors noted in the drafting of the Act include failing to specify whether subsequent pleadings filed in transferred matters were themselves transferred [See, *Beltre v. Gonzales*, 2005 WL 1802862 (SD NY 2005)], and whether the transfer of habeas actions pursuant to the Act included only removal issues or detention issues as well. [See also, *Construction and Application of the Real ID Act of 2005*, Jay Zitter, 11 ALR Fed. 2d 1 (2006)]

While it is true that the Second, Fifth, Seventh, Ninth and Tenth Circuits have agreed with the 3rd Circuit regarding the want of jurisdiction where petitions for review were not filed within 30 days of the Board's final administrative order, the other circuits have not, so this issue is clearly not well settled. [Id.] Those courts, as the Court of Appeals did in this case, failed to make note of the inherent inability of an alien to file an

appeal within a specified period of time before a court without jurisdiction to consider such an appeal. The drafting defect in the Real ID Act as it relates to this issue failed to make provisions for the treatment of cases where the requirement that the filing deadline be calculated from the date of the Board decision conflicts with the provision that appeals be filed before courts without jurisdiction to consider the appeal.

The rules of statutory construction provide further justification for the Petitioner's assertion that the original panel erred. First, deportation statutes mustbe narrowly interpreted in favor of the alien. *INS v. St. Cyr,* 121 S. 2271, 2290 (2001) Any interpretation of the Real ID Act that purports to limit the repeated assertion of Congress that aliens have 30 days to present petitions for review to Circuit courts must be narrowly construed. The Court of Appeals' construction of the statute was not, by any means narrow, especially given the clear statement from Congress that the 30 day deadline was not to apply in transferred cases. Moreover, Congressional statutes are to be interpreted with the view of avoiding constitutional questions. *Zadvydas v. Davis,* 121 S. Ct. 2491, 2505 (2001)

The Court of Appeals's interpretation raises both due process and equal protection concerns without providing any rational explanation as to why Congress would, against its long established policy of giving aliens 30 days to file petitions for review, authorize a reduction in the filing time permitted for some aliens and an elimination of any filing period for other aliens. Moreover, the Court of Appeals failed to provide any rational explanation as to why Congress would choose

to treat similarly situated aliens so differently when the difference in treatment is based completely on the vagaries of when the Board happened to issue final orders in their cases and when Congress happened to have enacted the Real ID Act. It was simply by happenstance that the Petitioner's decision from the Board was rendered when it was.

Further, the Court of Appeals has noted that while the intent of Congress in enacting the Real ID Act was to streamline the appellate process, Congress still intended to give aliens their day in court. [See, *Bonhometre* (supra)] The court went on to state that to ignore this fact would work an injustice.

The Petitioner's assertion that the interpretation of the Act by the Court of Appeal rendered portions of the Act unconstitutional has been adopted by other federal courts. [See, *Okeezie v. Chertoff*, 2006 WL 1280962 (WD Texas), finding that the government's motion to dismiss due to want of jurisdiction would render the Real ID Act unconstitutional since the 30 day filing deadline had already expired for the Petitioner by May 11, 2005 and the Petitioner would be left withoutan adequate remedy if unable to file a petition for review.]

Accordingly, inasmuch as the Court of Appeals had no jurisdiction to consider the Petitioner's petition for review as of April 19, 2005, it was error for the original panel to penalize the Petitioner for not having filed the petition for review as of that date so as to assert lack of jurisdiction to consider his appeal. The Court of Appeals acquired jurisdiction over appeals such as the Petitioner's on May 11, 2005 and could only have accepted an appeal as of that date. Accordingly, as it is

clear that Congress intended through its prior legislation and its specific language
in the Real ID Act that the 30 day filing deadline was not to be applied to transferred cases, the calculation of the filing deadline could only begin as of May
11, 2005 and expired on June 10, 2005. Inasmuch as the Court of Appeals docketed the Petitioner's appeal as of June 9, 2005, it was clearly timely and the
decision of the Court of Appeals should be vacated.

It should also be noted that the Court of Appeals also erred in asserting that Counsel did not provide proper documentation regarding the date on which the Petitioner's appeal was filed in the District Court. Counsel's reply to the government's motion to dismiss contained documents obtained directly from the
District Court and that was so indicated in the reply. The District Court was the appropriate forum to determine whether the Petitioner's filing in that court was timely and for that reason, the Respondent was required to raise the jurisdictional issue before that court which it failed to do and has provided no justifiable ground for its failure to do so.

Further, the Court of Appeals erred in not remanding the matter to the District Court if it believed that it was without jurisdiction to consider the Petitioner's appeal. *4 Am Jur. 2nd (Appellate Review, Section 211)* Though the Court of Appeals stated that the District Court took no action to transfer the case to the Court of Appeals based on other jurisdictional grounds possessed by the District Court, the District Court never had an opportunity to consider such other grounds because the Respondent neglected to raise its jurisdictional challenge to the

transfer of the Petitioner's appeal under the Real ID Act before the District Court and thus, never had any notice that it might need to take such action.

Conclusion

WHEREFORE, for all the aforementioned reasons, Petitioner respectfully asks that his petition for writ of certiorari be GRANTED.

Sincerely,

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Attorney For Petitioner,
Trevor Cazoe

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2914

TREVOR CAZOE,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

(BIA No. A72-771-030)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,
SLOVITER, McKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES,
JORDAN AND ALDISERT*, Circuit Judges

The petition for rehearing filed by petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
/s/Anthony J. Scirica
Chief Judge

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* As to panel rehearing only.

Dated January 17, 2007
DMM/cc: Sandra L. Greene, Esq.
Carl H. McIntyre Jr. Esq.
Gerald B. Sullivan, Esq.

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2914
TREVOR CAZOE,
Petitioner
v.
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

On Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A72-771-030
(US Immigration Judge: Honorable Grace A. Sease)

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 6, 2006
Before: SCIRICA, Chief Judge, BARRY, ALDISERT,
Circuit Judges
(Filed November 17, 2006

OPINION OF THE COURT

SCIRICA, Chief Judge,

Trevor Cazoe petitions for review of the Board of Immigration Appeals' final order of removal dated April 19, 2005. He asks us to vacate and reverse the order and allow him to apply for cancellation of removal, or, in the alternative, to remand for further adjudication of whether his rape conviction qualifies as an aggravated felony.

We will dismiss the petition for review for lack of jurisdiction.

I.

Cazoe, a citizen of Trinidad and Tobago, entered the United States as a visitor in 1989. He became a conditional permanent resident in 1994, and following his marriage to a US citizen, became a lawful permanent resident of February 21, 1996.

On August 24, 2004, Cazoe pleaded guilty in the Superior Court of Delaware to one count of rape in the fourth degree and two counts of third degree unlawful sexual conduct. The court sentenced Cazoe to five years in prison on the rape charge and concurrent one-year sentences on each unlawful sexual conduct charge.

On November 23, 2004, the Executive Office for Immigration Review served Cazoe with a notice to appear before an Immigration Judge to answer charges that his criminal convictions in Delaware made him eligible for removal. The basis for these immigration charges was the definition of "aggravated felony" provided in federal immigration law at 8 USC section 1101(a)(43)(A) and (F). The first of these subsections defines aggravated felony as a "crime of violence," a term defined in 18 USC section 16, for which the term of imprisonment is at least one year. The Code provides that an otherwise legal alien becomes deportable following conviction on an aggravated felony.

At Cazoe's immigration hearing on December 1, 2004, he admitted his Delaware convictions, but

sought a continuance to research whether Delaware's fourth degree rape definition qualified as an "aggravated felony" under the Code.

The IJ denied the continuance and found Cazoe's convictions satisfied the Code definition of aggravated felony under both 8 USC sections 1101(a)(43)(A)and (F). The IJ subsequently found by clear and convincing evidence that Cazoe was removable under the Act, and ordered him removed to Trinidad and Tobago.

On review, the Board affirmed the IJ, but only on the basis of 8 USC section 1101(a)(43)(F), determining that the Delaware crime of fourth degree rape is an aggravated felony within the meaning of the Act because it is (1) a crime of violence as defined at 18 USC section 16, and (2) the term of imprisonment is at least one year.

The Board's order, dated April 19, 2005, noted the requirement of intent to engage in an act of sexual intercourse or penetration with a non-consenting person in Delaware's fourth degree rape statute. The Board added that when committing this offense, the actor disregards a substantial risk he will have to use physical force against his victim.

The Board's order addressed only 8 USC section 1101(a)(43)(F) (crime of violence), and expressed no opinion on whether Cazoe's convictions qualify as aggravated felonies under 8 USC section 1101(a)(43)(A) rape or sexual abuse of a minor).

Cazoe filed a petition for a writ of habes corpus (28 USC section 2241) with the District Court, though the exact date of the filing is in dispute. Official court

records recite the petition was not filed until May 23, 2005. But the statutory thirty-day time limit for making this filing ran four days earlier, on May 19, 2005. Cazoe contends he filed the petition on May 19, 2005, submitting copies of three District Court forms- a civil cover sheet, a designation form and a case management form- each signed by Cazoe's attorney and dated May 19, 2005, the final day of the statutory time for filing. But these document also bear the handwritten date May 23, 2005, circled in darker ink. None of the documents bear any stamp or signature of any court official indicating the date of receipt. Court records only show the petition was filed on May 23, 2005, fourdays after the statutory time iimit for filing had run.

Nonetheless, the District Court treated Cazoe's petition as a petition for review under transfer provisions of the newly effective Real ID Act of 2005, Pub. L. 109-13 section 106 (codified in a note following 8 USC section 1252) and transferred it to this court. In June 2005, the government filed a motion to dismiss for lack of jurisdiction because the Board's order was based on Cazoe's conviction for an aggravated felony. We referred this motion to the merits panel. In December 2005, after Cazoe filed an opening brief, the government filed another motion to dismiss for lack of jurisdiction because the petition for review was untimely. We also referred this motion to the merits panel.

At some point after filing his original habeas corpus petition, Cazoe was removed to Trinidad and Tobago. Subsequent to his removal, we granted a stay

of removal on September 13, 2005.

II.

We have jurisdiction to review "constitutional claims or questions of law raised upon a petition for review" under 8 USC section 1252(a)(2)(D). Purely legal questions are reviewed de novo. *Kamara v. Attorney General,* 420 F.3d 202, 211 (3rd Cir. 2005) Substantial deference is given to the Board's construction of the Immigration and Nationality Act because it is the agency charged with administering the Act. See *Acosta v. Ashcroft*, 341 F.3d 218, 222 (3rd Cir. 2003). But we owe no deference to the Board's interpretation of state and federal criminal laws.

III.

The government contends we have no jurisdiction to hear this appeal because it was not timely filed. We agree.

An appeal for review of a final Board order must be filed "not later than 30 days after the date of the final order of removal." 8 USC section 1252(b)(1). The Real ID Act, which came into effect on May 11, 2005, directed district courts to transfer to the appropriate court of appeals any cases then pending which were brought under 28 USC section 2241 as challenges to a final administrative order of removal or deportation.

Cazoe filed a petiton for habeas corpus (28 USC

section 2241) in the District Court after the Board issued its final order on April 19, 2005. The thirty day appeal period ran on May 19, 2005. Despite Cazoe's assertions, court records clearly show his petition for habeas corpus was not filed until May 23, 2005, four days after the statutory time limit had expired. The only evidence Cazoe offers to counter this are the three court forms mentioned above, which bear both
May 19 and May 23, the later date handwritten and circled on each document. None of these documents bears a court seal, stamp, or signature indicating the date it was received. In a January 2005 reply to a government motion to dismiss, Cazoe's counsel stated she spoke to "several employees of the clerk's office" about the discrepancy in date and was told that May 23, 2005 was the filings were docketed, but not the date they were received. But Cazoe offers no evidence to support this allegation of error by the clerk, nor does he refer to these alleged conversations with
court employees in his answer brief, filed three months later. Cazoe's submissions to this court give us no reason to doubt the accuracy of the official court records indicating he filed his petition on May 23, 2005. As a result, his petition for habeas corpus, insofar as it was treated as a petition for review, was not timely filed.

In any event, the petition for habeas corpus was not properly transferred to this court. The transfer provisions of the Real ID Act apply only to habeas corpus petitions pending as of the effective date of the Act. The Act was effective May 11, 2005, but Cazoe's petition was not filed until May 23, 2005. Therefore,

the petition was not within the class of transferable cases described in the Act, and was not properly transferred to this court.

The District Court could nonetheless have transferred the case under 28 USC 1631 if it found that the transfer was "in the interest of justice" but no such finding appears in the record. Furthermore, the courts of appeals " may not extend the time to file" a petition for review of an order of an administrative board, such as the Board of Immigration Appeals. Fed. R. App. P. 26(b)(2); *Malvosin v. INS*, 268 F.3d 74, 76 (2nd Cir. 2001)

Because the petition for review was not timely filed, we have no jurisdiction to hear this appeal.

IV.

For the reasons detailed we lack jurisdiction to review the Board's final order. Cazoe's petition for review will be dismissed for lack of jurisdiction.

Decision Of The Board Of Immigration Appeals
US DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A72-771-030-York Date: April 19, 2005
In re: TREVOR CAZOE

IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Sandra Greene, Esquire
CHARGE:
Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 USC section 1227(a)(2)(A)(iii)]-Convicted of aggravated felony pursuant to section 101(a)(43)(A), I&N Act [8 USC sction 1101(a)(43)(A)]

Sec. 237(a)(2)(A)(iii), I&N Act. [8 USC section 1227(a)(2)(A)(iii)]- Convicted of aggravated felony pursuant to section 101(a)(43)(F), I&N Act [8 USC section 1101(a)(43)(F)]

APPLICATION: Termination of Removal Proceedings

ORDER:
PER CURIAM. We affirm the Immigration Judge's December 1, 2004, decision ordering the respondent removed from the United States as an alien convicted of an aggravated felony. Specifically, we conclude that the respondent's August 2004 conviction for the felony offense of fourth-degree

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rape in violation of DEL. CODE Ann. Tit. 11 section 770, for which he was sentenced to a 5-year term of imprisonment, qualifies as an aggravated felony within the meaning of section 101(a)43)(F) of the Immigration and Nationality Act, 8 USC , 8 USC section1101(a)(43)(F); to wit, a crime of violence under 18 USC section 16 for which the term of imprisonment is at least 1 year.[1]

To be convicted of fourth-degree rape under Delaware law, an offender must intentionally engage in sexual intercourse or sexual penetration with a child or other non-consenting individual. When an individual undertakes to engage in sexual intercourse or penetration with a person who

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[1] According to 18 USC section 16, the term "crime of violence" means either (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or(b)any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

is incapable of consent (or, alternatively, capable of legal consent but unwilling to grant it) that individual necessarily disregards a substantial risk that he will have to intentionally use physical force against that person in the course of committing the offense, either to enforce compliance with the initial act of intercourse or penetration or to overcome the victim's resistance or both. See *Leocal v. Ashcroft*, 543 US____, 125 S.Ct. 377, 383 (2004) (Holding that section 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense"). Accordingly, we conclude that the Delaware offense of fourth-degree rape is a crime of violence under 18 USC section 16(b). See *United States v. Taylor,* 98 F.3d 768, 773 (3rd Cir. 1996); see also *Sutherland v. Reno*, 228 F.3d, 171, 176-77 (2nd Cir. 2000); *United States v. Velazquez-Olivera*, 100 F.3d 418, 422 (5th Cir. 1996); *United States v. Reyes-Castro,* 13 F.3d 377, 379 (10th Cir. 1993); *United States v. Rodriguez*, 979 F.2d 138, 141 (8th Cir. 1992). Because the respondent was sentenced to a term of imprisonment of at least 1 year as a result of his rape conviction, he stands convicted of an aggravated felony under section 101(a)(43)(F) of the Act.

Because the respondent's fourth-degree rape offense qualifies as an aggravated felony under section 101(a)(43)(F) of the Act, we express no opinion as to whether that offense or any of the respondent's other offenses) would qualify as an aggravated felony under section 101(a)(43)(A) of the Act.

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The appeal is dismissed.

Frederick Hess

FOR THE BOARD